Supreme Court, U.S.
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No. 95-278

In the Supreme Court of the United States

OCTOBER TERM, 1995

KEITH GORDON HAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause prevents the government from seeking an order of forfeiture in a second trial after reversal of petitioner's convictions where the jury at petitioner's first trial did not return a special verdict concerning the scope of property subject to forfeiture.

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U.S. Const. Amend. V (Double Jeopardy Clause) 5, 6, 7, 8, 9, 10, 11

Racketeer Influenced and Corrupt Oranizations Act, 18 U.S.C. 1961 *et seq.*:

18 U.S.C. 1962(a) 2

18 U.S.C. 1962(c) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 58 F.3d 78. The opinion of the district court (Pet. App. 16-24) is unreported. The opinion of the court of appeals in petitioner's prior appeal is reported at 998 F.2d 1247.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1995. A petition for rehearing was denied on

July 18, 1995. Pet. App. 14-15. The petition for a writ of certiorari was filed on August 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An indictment returned in the United States District Court for the Northern District of West Virginia charged petitioner with conspiring to conduct and participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); investing income derived from a pattern of racketeering activity in the operation of an enterprise, in violation of 18 U.S.C. 1962(a); conspiring to travel in interstate commerce to commit murder, in violation of 18 U.S.C. 371; aiding and abetting travel in interstate commerce to commit murder, in violation of 18 U.S.C. 1958; two counts of conspiring to commit mail fraud, in violation of 18 U.S.C. 371; and four counts of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 2 n.1; C.A. App. 17-63. The indictment also alleged that petitioner's interest in certain property was subject to forfeiture pursuant to 18 U.S.C. 1963. Pet. App. 2-3; C.A. App. 64-157.

Rule 31(e) of the Federal Rules of Criminal Procedure provides that "[i]f the indictment * * * alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." Petitioner's counsel requested that the court not submit the issue of forfeiture to the jury "unless and until the jury returns a verdict in the case, which would make forfeiture an issue." C.A.

App. 189; see Pet. App. 3. In accord with that request, the district court ruled that the jury initially need decide only whether racketeering proceeds were invested in the property that was alleged to be subject to forfeiture. *Ibid.*; C.A. App. 192-193. In response to the court's ruling, petitioner's counsel drafted an interrogatory to be answered if the jury found petitioner guilty on any of the Racketeer Influenced and Corrupt Organizations Act (RICO) counts. Pet. App. 3. The interrogatory, which was included in the verdict form submitted to the jury, asked the jurors: "Did the defendant acquire an interest in, establish, and/or operate [specified property] with income received from racketeering acts as detailed in [the RICO counts]?" *Id.* at 4; C.A. App. 231.

The jury convicted petitioner on the RICO and mail fraud counts of the indictment, but failed to reach a verdict on the murder counts. The jurors also checked "yes" in response to the forfeiture interrogatory. Pet. App. 3-4; C.A. App. 230-233. After the clerk read the jury's verdict and polled the jurors, the district court thanked the members of the jury for their time and effort, apologized for their inconvenience, and wished them happy Easter.[1] Pet. App. 9.

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[1] The court stated:

> Ladies and gentlemen of the jury, I am not going to delay you very much longer. But I would be remiss if I didn't express to you the fact that [it is] people like you that make the system work.
>
> I have been at it a long time, and been on the bench almost 25 years. I have never gone away from a case in which I didn't think juries had done what they thought was right, which makes it right. But I have never seen a jury take the time and make the effort that you have. And we are very very grateful for that.

The court then dismissed the jury without objection from either counsel. Pet. App. 4, 9-10.

At the sentencing hearing, petitioner's counsel pointed out that the government had failed to obtain a special verdict regarding the extent of the property subject to forfeiture. Pet. App. 4; C.A. App. 236-237. The district court concluded that a new jury could make the requisite findings and advised the prosecutor to "set it down for a jury." Pet. App. 4; C.A. App. 245. The court then entered a general order requiring petitioner to forfeit to the government "all of his interest" in property identified in the forfeiture count of the indictment, but did not order forfeiture of any specific property. Pet. App. 4; C.A. App. 8, 246.

Petitioner appealed his convictions and sentence. The court of appeals vacated his convictions and remanded for a new trial, holding that the district court had erred in admitting evidence of child molestation, homosexuality, and mistreatment of women because the danger of unfair prejudice outweighed the proba-

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> Miss Mallow will go to the office now, and some of you may need a slip or something, and she will take care of it. I have other matters to do. But all of us are ever so grateful to you for your time, you have done your civic duty. And if you are called within the next year and you don't want to serve, I hope you will, but if you don't, you just tell them you have been excused. Because you have done yeoman's work.
>
> Thank you, and I apologize for all of the inconvenience. But if people weren't willing to do it, as you have, then the whole system would fall apart. Have a happy Easter. Thank you.
>
> All right, Marshal, take the jury.

C.A. App. 216-217.

tive value of the evidence. Pet. App. 5; see *United States* v. *Ham*, 998 F.2d 1247 (4th Cir. 1993).

On remand, petitioner moved to dismiss the forfeiture count of the indictment. Because the district court had failed to submit the forfeiture issue to the jury at the first trial, petitioner contended, the Double Jeopardy Clause barred the government from seeking forfeiture in the second prosecution. Pet. App. 5. The district court denied the motion, concluding that the jury's affirmative answer to the forfeiture interrogatory was sufficient to comply with the requirements of Rule 31(e). Pet. App. 5-6, 23-24.

2. Pursuant to *Abney* v. *United States*, 431 U.S. 651 (1977), petitioner filed an interlocutory appeal. The court of appeals affirmed. Pet. App. 1-13. Noting that the jury at petitioner's first trial had not been asked to determine the scope of the property subject to forfeiture, the court of appeals found that "trial never even began on the Rule 31(e) forfeiture issue." *Id.* at 7-8. The court held that "the double jeopardy rules that apply in mistrial situations also apply when a court fails to try a discrete portion of the case before the original jury." *Id.* at 8. Thus, the court stated, "if a defendant has an opportunity to object to the trial court's dismissal of the jury before it decides a discrete portion of the case, but fails to do so, the defendant impliedly consents to the jury's dismissal and cannot raise a double jeopardy defense to further prosecution before a second jury." *Id.* at 9.

The court of appeals determined that petitioner could have asserted his right to have the original jury decide the forfeiture issue before the jurors were

dismissed. Pet. App. 9-10.[2] By failing to object, the court of appeals concluded, petitioner impliedly consented to the dismissal of the jury. *Id.* at 10. The court of appeals therefore held that the Double Jeopardy Clause did not bar submission of forfeiture issues to the jury at petitioner's second trial. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 12-24) that submission of forfeiture issues to the jury at his second trial would violate the Double Jeopardy Clause. That claim is without merit and does not warrant this Court's review.

1. Criminal forfeiture is properly regarded as a punishment, not as an element of the RICO offense or as a free-standing crime. See, *e.g.*, 18 U.S.C. 1963(a) ("The court, in imposing sentence on [any person convicted of a RICO violation] shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection."); *Alexander* v. *United States*, 113 S. Ct. 2766, 2775-2776 (1993) ("The *in personam* criminal forfeiture [authorized by RICO] is clearly a monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'").[3] When a criminal conviction is reversed on

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[2] The court noted that petitioner "probably had strategic reasons for not reminding the court" that the jury had not returned a special verdict on the forfeiture question, since it was "unlikely that [petitioner] wanted the same jury that had just convicted him of nine of the eleven counts also to decide the remaining forfeiture issue." Pet. App. 10 n.4.

[3] The government's brief in No. 94-7427, *Libretti* v. *United States* (argued October 3, 1995), explains in greater detail why criminal forfeiture is properly characterized as a punishment

appeal, the Double Jeopardy Clause generally does not prohibit the imposition at a second trial of penalties that were not imposed at the first. See, *e.g.*, *Schiro* v. *Farley*, 114 S. Ct. 783, 789 (1994). Rather, the "usual rule * * * when a defendant obtains reversal of his conviction on appeal" is that "the original conviction has been nullified and 'the slate wiped clean' [and that] * * * if the defendant is convicted again, he constitutionally may be subjected to whatever punishment is lawful, subject only to the limitation that he receive credit for time served." *Poland* v. *Arizona*, 476 U.S. 147, 152 (1986) (quoting *Bullington* v. *Missouri*, 451 U.S. 430, 442 (1981)). Accord, *e.g.*, *North Carolina* v. *Pearce*, 395 U.S. 711, 720 (1969) ("a corollary of the power to retry a defendant [after a conviction has been set aside] is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction"). Thus, the jury's failure to render a Rule 31(e) special verdict at petitioner's initial trial would not prevent the imposition of a criminal forfeiture penalty if petitioner is again convicted.

This Court has identified two exceptions to the general rule, but neither is applicable to the present case. First, the Court has recognized that "[d]ue process of law * * * requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Pearce*, 395 U.S. at 725. Petitioner does not contend that such vindictive-

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for criminal activity, not as an element of the offense or as a separate crime. See Br. 19-24. We have provided counsel for petitioner with a copy of our brief in *Libretti*.

ness influenced either the government's effort to obtain an order of forfeiture at his second trial or the district court's willingness to submit that issue to the jury. No such contention would be plausible. Indeed, the government sought an order of forfeiture at petitioner's initial trial, and the district court indicated that the issue should be presented to a jury, before petitioner obtained a reversal of his first conviction. See Pet. App. 4.

This Court has also recognized, in the context of capital sentencing, that a judge or jury's decision not to impose a sentence of death may sometimes reflect an implicit determination that the government has "failed to prove its case" regarding the appropriateness of that punishment. See *Bullington*, 451 U.S. at 438-446 (where defendant was convicted and sentenced to life imprisonment, and his conviction was reversed on appeal, Double Jeopardy Clause forbade imposition of a capital sentence if defendant was reconvicted at a second trial); *Arizona* v. *Rumsey*, 467 U.S. 203, 209-210 (1984) (same). Even assuming that the same principle may sometimes apply to non-capital sentencing, it would not be applicable here. As petitioner acknowledges (Pet. 7-8), the jury at his first trial was "never asked to and did not render a verdict" as to the extent of the property subject to forfeiture. The jury made no finding that the prosecution had failed to prove its case with respect to the scope of property subject to forfeiture; instead, "the trial never even began on the Rule 31(e) forfeiture issue." Pet. App. 8.[4] Accordingly, the Double Jeopardy Clause does not

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[4] The jury's only finding on the forfeiture question was its determination that petitioner had invested racketeering proceeds in the property alleged to be subject to forfeiture.

bar imposition of criminal forfeiture if petitioner is retried and reconvicted. See *Poland*, 476 U.S. at 154-157 (Double Jeopardy Clause did not bar capital sentence at second trial where neither the trial nor the appellate court in petitioner's initial prosecution had determined that a capital sentence was inappropriate).

2. The court of appeals treated the district court's dismissal of the jury as analogous to a declaration of a mistrial with respect to the issue of forfeiture. See Pet. App. 8. For the reasons stated above, we believe that petitioner's claim is more appropriately analyzed by reference to the legal principles governing the imposition, at a second trial, of penalties greater than those imposed at the first. Even if the court of appeals' analogy were valid, however, there would be no double jeopardy bar to submission of forfeiture issues to the jury at petitioner's retrial, since petitioner impliedly consented to the dismissal of the jury at the initial trial.

The Double Jeopardy Clause does not bar retrial after a mistrial "granted at the defendant's request or with his consent." *United States* v. *Dinitz*, 424 U.S. 600, 608 (1976). The courts of appeals have consistently held that a defendant's consent may be inferred when the defendant has an opportunity to object to the declaration of a mistrial but fails to do so.[5] See, *e.g.*, *United States* v. *Nichols*, 977 F.2d 972,

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Pet. App. 3-4. Thus, the jury found petitioner guilty on the RICO counts and agreed that he had invested racketeering proceeds in forfeitable property, without being asked to determine the extent of the forfeitable property.

[5] Contrary to petitioner's suggestion (Pet. 21-23), this Court made clear in *Dinitz* that it had "implicitly rejected the contention that the permissibility of a retrial following a

974-975 (5th Cir. 1992), cert. denied, 114 S. Ct. 106 (1993); *United States* v. *DiPietro*, 936 F.2d 6, 9-12 (1st Cir. 1991); *Camden* v. *Circuit Court of Second Judicial Circuit*, 892 F.2d 610, 614-618 (7th Cir. 1989), cert. denied, 495 U.S. 921 (1990); *United States* v. *Puleo*, 817 F.2d 702, 705 (11th Cir.), cert. denied, 484 U.S. 978 (1987). Cf. *Maula* v. *Freckleton*, 972 F.2d 27, 28-29 (2d Cir. 1992) (reprosecution of defendant on weapons charges did not violate Double Jeopardy Clause when defendant had failed to object to trial court's announcement at first trial that it would not submit weapons counts to jury), cert. denied, 113 S. Ct. 1255 (1993).

In this case, the court of appeals correctly concluded that petitioner's consent to the dismissal of the jury at his first trial could be inferred from his failure to object. As the court of appeals observed (Pet. App. 9-10), it was clear from the district court's remarks after the jury returned its verdict that the court was preparing to dismiss the jurors.[6] Petitioner's counsel could simply have reminded the court

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mistrial * * * depends on a knowing, voluntary, and intelligent waiver of a constitutional right." 424 U.S. at 609 n.11 (citing cases). The Court explained that it was error to "treat[] the defendant's interest in going forward before the first jury as a constitutional right comparable to the right to counsel," and that reliance on the waiver standard of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), was misplaced in that context. *Dinitz*, 424 U.S. at 609 n.11.

[6] Thus, petitioner's claim (Pet. 20) that the district court dismissed the jury with "no forewarning" is without merit. In any event, petitioner's disagreement with the court of appeals' determination that he had an adequate opportunity to raise the Rule 31(e) issue before the jury was dismissed does not raise any issue of general importance warranting this Court's review.

that the jury had not yet made the determination required by Rule 31(e). By failing to bring the omission to the district court's attention, petitioner consented to the dismissal of the jury without its having considered the forfeiture issue. See *Maula* v. *Freckleton*, 972 F.2d at 29 (defendant's consent to trial court's failure to submit weapons counts to jury could be inferred from his "strategic choice" not to object).

As petitioner points out (Pet. 17-18), the Sixth Circuit has stated that "[c]onsent to a mistrial order should only be implied where the circumstances positively indicate a defendant's willingness to acquiesce in the order." *United States* v. *White*, 914 F.2d 747, 753 (6th Cir. 1990) (quoting *Jones* v. *Hogg*, 732 F.2d 53, 57 (6th Cir. 1984)). Petitioner cites no case, however, that holds that the Double Jeopardy Clause bars the government from retrying a defendant following a mistrial where the defendant had an opportunity to object to the mistrial but failed to do so. Instead, as the First Circuit has noted, "where courts have held that the failure to object did not foreclose a good double jeopardy plea, they have generally done so because there was no opportunity to object." *DiPietro*, 936 F.2d at 10-11 & nn.25-27 (distinguishing *White*); see *Glover* v. *McMackin*, 950 F.2d 1236, 1240 (6th Cir. 1991) ("summary nature of the trial court's actions" in declaring mistrial and immediately dismissing jury and adjourning court "rendered an objection both unlikely and meaningless"); *White*, 914 F.2d at 754 (jury was discharged before defense counsel "had any reasonable opportunity to consider the import of the declaration of the mistrial and act upon it"). Cf. *Jones* v. *Hogg*, 732 F.2d at 57 (record on appeal failed to show whether defendant objected to

declaration of mistrial and whether defense counsel "was afforded an adequate opportunity to be heard on the question of mistrial").[7] In this case, the court of appeals' conclusion that petitioner had consented to a mistrial was based on its determination (Pet. App. 10) that petitioner "could have * * * prevented the district court from prematurely dismissing the jury." Thus, there is no conflict between the decision below and the cases on which petitioner relies.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1995

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[7] In the other Sixth Circuit decision on which petitioner relies (Pet. 18), *Malinovsky* v. *Court of Common Pleas*, 7 F.3d 1263 (6th Cir. 1993), cert. denied, 114 S. Ct. 1300 (1994), the court noted that the defendant had expressly "objected to the trial court's dismissal" of the charges. 7 F.3d at 1272.